IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRADBURN PARENT/TEACHER STORE, INC.	:	CIVIL ACTION
v.	:	
3M (MINNESOTA MINING AND MANUFACTURING COMPANY)	:	NO. 02-7676

Padova, J. **MEMORANDUM** **March __, 2004**

Plaintiff Bradburn Parent/Teacher Store has filed a Motion for Class Certification, seeking certification of a class of plaintiffs who directly purchased invisible and transparent tape from Defendant from October 2, 1998 until the present. Defendant 3M opposes the motion on the ground that the class proposed by Plaintiff does not satisfy the prerequisites for certification found in Federal Rule of Civil Procedure 23. Specifically, Defendant argues that Plaintiff will not adequately represent the members of the proposed class. Defendant further argues that, given the unique factual circumstances of this case, individual questions predominate over common questions. For the reasons that follow, the Court finds that Plaintiff is not an adequate representative of the proposed class pursuant to Rule 23(a)(4), and therefore denies Plaintiff's Motion for Class Certification.

I. BACKGROUND

The conduct of Defendant which forms the basis of this lawsuit was the subject of a prior lawsuit in this Court, LePage's, Inc. v. 3M, Civ. A. No. 97-3983. In that suit, a competing supplier of

transparent tape, LePage's, Inc. ("LePage's"), sued Defendant alleging, *inter alia*, unlawful maintenance of monopoly power in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2. After a nine-week trial, the jury found in favor of LePage's on its unlawful maintenance of monopoly power claim, and awarded damages of $22,828,899.00, which were subsequently trebled to $68,486,697.00. See LePage's, Inc. v. 3M, Civ. A. No. 97-3983, 2000 U.S. Dist. Lexis 3087 (E.D. Pa. Mar. 14, 2000). This Court subsequently denied Defendant's Motion for Judgment as a Matter of Law with respect to this claim. See id. A panel of the United States Court of Appeals for the Third Circuit ("Third Circuit") initially reversed this Court's Order upholding the jury's verdict and directed this Court to enter judgment for Defendant on LePage's' unlawful maintenance of monopoly power claim. LePage's, Inc. v. 3M, 277 F.3d 365 (3d Cir. 2002) ("LePage's I"). Upon rehearing *en banc*, the Third Circuit vacated the panel decision and reinstated the jury verdict against Defendant on LePage's' unlawful maintenance of monopoly power claim. LePage's, Inc. v. 3M, 324 F.3d 141 (3d Cir. 2003) ("LePage's II").

The Complaint in this matter alleges one count of monopolization in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2. The Complaint alleges that Defendant unlawfully maintained its monopoly in the transparent tape market through its

bundled rebate programs[1] and through exclusive dealing arrangements with various retailers. The Complaint asserts that, as a result of Defendant's conduct, Plaintiff and other members of the proposed Class have "suffered antitrust injury." (Compl. ¶ 27). The damages period in this case runs from October 2, 1998 until the present. (Compl. ¶ 2). Plaintiff seeks declatory relief, permanent injunctive relief, treble compensatory damages, attorney's fees, costs and interest. (See Compl. ¶¶ A-F). Plaintiff seeks certification of:

> a class of persons . . . directly purchasing from the Defendant invisible and transparent tape between October 2, 1998 and the present.

(Compl. ¶ 10.)

II. LEGAL STANDARD

Before a class may be certified pursuant to Federal Rule of Civil Procedure 23, the plaintiff "must establish that all four requisites of Rule 23(a) and at least one part of Rule 23(b)are met." Baby Neil v. Casey, 43 F.3d 48, 55 (3d Cir. 1994).[2] The

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[1] As described at length in the LePage's litigation, Defendant's bundled rebate programs provided purchasers with significant discounts on Defendant's products. However, the availability and size of the rebates were dependant upon purchasers buying products from Defendant from multiple product lines. See LePage's II, 324 F.3d at 154-55.

[2] Some district courts have held that the defendant bears the burden of proving that a class representative is inadequate. See e.g., Welch v. Bd. of Directors of Wildwood Golf Club, 146 F.R.D. 131, 136 (W.D. Pa. 1991). However, these cases all predate Baby Neil, and their holdings appear inconsistent with Baby Neil's holding.

requirements of Rule 23(a) are as follows:

> (1) Numerosity (a "class [so large] that joinder of all members is impracticable");
> (2) commonality ("questions of law or fact common to the class");
> (3) Typicality (named parties' claims or defenses are "typical of . . . the class"); and
> (4) adequacy of representation (representatives "will fairly and adequately protect the interests of the class").

Amchem Prods. v. Windsor, 521 U.S. 591, 613 (1997)(citing Fed. R. Civ. P. 23(a)). The purpose of these procedural requirements is "so that the court can assure, to the greatest extent possible, that the actions are prosecuted on behalf of the actual class members in a way that makes it fair to bind their interests." Newton v. Merrill, Lynch, Pierce, Fenner & Smith, 259 F.3d 154, 182 (3d Cir. 2001).

Plaintiff asserts that it satisfies the requirements of Rule 23(b)(3). The prerequisites for certification under Rule 23(b)(3) are as follows:

> To qualify for certification under Rule 23(b)(3), a class must meet two requirements beyond the Rule 23(a) prerequisites: Common questions must "predominate over any questions affecting only individual members"; and class resolution must be "superior to other available methods for the fair and efficient adjudication of the controversy."

Amchem Prods., 521 U.S. at 615.

Class certification rests within the District Court's discretion. Eisenberg v. Gagnon, 766 F.2d 770, 785 (3d Cir. 1985).

In determining whether the class should be certified, the Court examines only the requirements of Rule 23 and does not look at whether the Plaintiffs will prevail on the merits. Eisen v. Carlisle & Jacquelin, 417 U.S. 157, 177-78 (1973) ("In determining the propriety of a class action, the question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met.") (citations omitted). However, the Court must also "carefully examine the factual and legal allegations" made in the Complaint. Barnes v. American Tobacco Co., 161 F.3d 127, 140 (3d Cir. 1998).

III. DISCUSSION

A. Numerosity and Commonality

Plaintiff has asserted, without contradiction, that the number of members of the proposed class is “well over 200.” (Pl’s Mot. Class Cert. at 16.) Defendant does not argue that the numerosity requirement is not satisfied, and the Court finds that the class is so large that the joinder of all members is impracticable. Fed. R. Civ. P. 23(a)(1). Accordingly, the numerosity requirement is satisfied.

“The commonality requirement will be satisfied if the named plaintiffs share at least one question of fact or law with the grievances of the prospective class.” Baby Neil, 43 F.3d at 56. Defendant does not contest commonality, and the Court finds that

numerous common questions of law and fact are present in this case. The Court therefore finds that the commonality requirement is satisfied.

B. Adequacy of Representation

"The adequacy of the class representative is dependant on satisfying two factors: 1) that the plaintiffs' attorney is competent to conduct a class action; and 2) that the class representatives do not have interests antagonistic to the interests of the class." In re Linerboard Antitrust Litig., 203 F.R.D. 197, 207 (E.D. Pa. 2001)(citations omitted). Defendant does not challenge the ability of Plaintiff's law firm to litigate this class action. Rather, Defendant contends that Plaintiff is not an adequate class representative because it has interests which are in direct conflict with the interests of many of the potential class members. "The adequacy inquiry under Rule 23(a)(4) serves to uncover conflicts of interest between named parties and the class they seek to represent." Amchem Prods., 521 U.S. at 625. Thus, "a class representative must be part of the class and 'possess the same interest and suffer the same injury' as the class members." East Tex. Motor Freight Sys. v. Rodriguez, 431 U.S. 395, 403 (1977) (quoting Schlesinger v. Reservists Committee to Stop the War, 418 U.S. 208, 216 (1974)); see also Georgine v. Amchem Prods., Inc., 83 F.3d 610, 630 (3d Cir. 1996)(aff'd sub nom Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997))(finding class representative

inadequate where proposed settlement made "important judgments on how recovery is to be *allocated* among different kinds of plaintiffs, decisions that necessarily favor some claimants over others.") (emphasis in original.)

Consequently, the adequacy of representation requirement is not satisfied where "the named representative's interest in maximizing its own recovery provides a strong incentive to minimize the recovery of other class members." Yeager's Fuel v. Pennsylvania Power & Light Co., 162 F.R.D. 471, 478 (E.D. Pa. 1995)("Yeager's Fuel II"). For example, in Yeager's Fuel II, this Court refused to certify a class of competing retail fuel dealers who competed with each other in a limited market for retail fuel sales, and who argued that they lost business as a result of the defendant's anti-competitive conduct. Id. The Court noted that "the named representative's interest in maximizing its own recovery provides a strong incentive to minimize the recovery of other class members, which may be accomplished by showing that any business lost by other class members, as opposed to itself, was caused by some factor independent of the anti-competitive conduct." Id.; see also Pennsylvania Dental Assn. v. Medical Service Assn. of Pennsylvania, 745 F.2d 248, 263 (3d Cir. 1984)(refusing to certify class containing dentists who did and did not participate in a challenged dental fee program, because of "inherent conflicts" between the two groups.); Glictronics Corp. v. AT&T Co., 603 F.

Supp. 552, 586 (D.N.J. 1994)("cases in the Third Circuit consistently support the view that where the class members are competitors in a limited market, the named plaintiff's attempts to maximize its damage recovery will conflict with the interests of the other class members and class certification should be denied.")

Defendant maintains that, in this case, Plaintiff's interests directly conflict with the interests of many of the proposed class members. The members of the proposed class include large-volume retailers who, Defendant argues, occupy a significantly different position in the transparent tape market than does Plaintiff. Among other distinctions, these large-volume retailers purchase significant quantities of "private label" tape from competitors of 3M, such as LePage's, Inc.[3] In LePage's II, the Third Circuit determined that 3M's anti-competitive conduct worked to the detriment of private label competitors such as LePage's, who risked being forced out of the market for transparent tape because they could not match the total price discounts provided by 3M through its bundled rebate programs. See LePage's II, 324 F.3d at 162. By contrast, it is clear from the record that Plaintiff has never purchased such private label tape itself. (Larson Dep. at 44.) Moreover, Plaintiff has never purchased transparent tape from a supplier other than 3M. (Id. at 41.) Thus, Defendant argues that

[3] Private label tape was defined by the Third Circuit in Lepage's II as "tape sold under the retailer's name rather than under the name of the manufacturer." LePage's II, 324 F.3d at 144.

Plaintiff and the large-volume retailers compete with each other in the market for transparent tape by selling different products, thereby creating incentives for Plaintiff and the large-volume retailers to pursue widely differing strategies in order to maximize their potential recovery in this lawsuit. Specifically, large-volume retailers have an incentive to argue that, in the absence of 3M's anti-competitive conduct, private label tape would have gained market share at the expense of the market share enjoyed by 3M branded tape, because large volume retailers are in a position to profit from any such shift in market share from 3M branded tape to private label tape. Utilizing this theory, large-volume retailers could pursue recovery of the unrealized profits that they would have received from their ability to take advantage of the market shift from 3M branded tape to private label tape.

Plaintiff, by contrast, is solely pursuing an overcharge theory of damages, and seeks to recover the difference between the price of the 3M branded tape it purchased during the damages period and the price that such tape would have commanded absent 3M's anti-competitive conduct. Thus, Plaintiff has incentive to minimize the loss in market share that 3M branded tape would have suffered absent Defendant's anti-competitive conduct. Plaintiff also has further incentive to argue that, in order to maintain its market share, Defendant would have substantially lowered the prices for 3M branded tape. Defendant therefore argues that Plaintiff cannot

adequately represent the proposed class in these circumstances because its interests are not aligned with those of the large volume retailers that it seeks to represent. These large volume retailers, Defendant points out, comprised the vast majority of Defendant's transparent tape sales.[4]

Defendant relies upon the expert testimony of Dr. Daniel Rubinfeld. Dr. Rubinfeld opines that there is a strong likelihood that the different market positions held by various members of the proposed class will result in different class members wishing to pursue widely divergent litigation strategies when prosecuting this case from the very moment that the class is certified. Specifically, Dr. Rubinfeld opines that Plaintiff and other proposed class members who have purchased only 3M branded tape would have the strong incentive, from the moment that the class was certified, to develop their case around the proposition that, absent 3M's conduct, the market share of 3M branded transparent tape would have risen or stayed the same during the damages period of this case. (See 10/3/03 N.T. at 42-45.) Such a phenomenon would, in turn, maximize the amount of recovery for these plaintiffs under an overcharge approach. (See id.) By contrast, large-volume retailers such as Staples would have the strong

[4] See Def's Opp. Class Cert, Ex. B, ¶ 22 & Ex. 10 (expert report of Mr. David Kaplan noting that the top 25 proposed class members purchased 82 percent of Defendant's transparent tape, while the top 5 proposed class members, Wal Mart Stores, Inc., Office Depot, Staples, Kmart, and Corporate Express, purchased nearly half of Defendant's transparent tape.)

incentive, from the moment that the class was certified, to argue that, absent 3M's conduct, there would have been a large increase in the market share of private label tape, at the expense of the market share of 3M branded tape, in order to maximize the amount of their recovery under a lost profits theory. (See id.) According to Dr. Rubinfeld, these differing incentives create the strong possibility of conflict and antagonism between members of the proposed class that would be immediately present from the moment this case was certified as a class action.

Plaintiff responds that the conflict presented by Dr. Rubinfeld is, at best, speculative and hypothetical. Plaintiff contends, as a preliminary matter, that the lost profits theory of damages posited by Defendant rarely produces a greater amount of recovery than an overcharge theory of damages. For this proposition, Plaintiff relies upon II Phillip E. Areeda, et al., Antitrust Law, ¶ 394 (2d ed. 2000), which states that "the most accurate measure of the damages actually sustained is lost profit, but this will usually lead to smaller recoveries and therefore is not apt to be selected by plaintiffs." Furthermore, Plaintiff maintains that there has been no evidence presented in this case that a lost profits theory of damages would produce a greater recovery for any of the potential class members than an overcharge theory of damages. Thus, Plaintiff argues, the supposed conflict between large-volume retailers and class members in Plaintiff's

position is essentially a red herring that the Court should disregard. Moreover, according to Plaintiff, if it pursues an overcharge theory of damages in which the parties are compensated for the difference between the price of 3M transparent tape in the actual and but-for worlds, there will be no conflict between members of the proposed class.[5] Plaintiff contends that, under this scenario, all members would want to argue that the price of 3M branded tape would have decreased in response to competition in a but-for world, and would seek to maximize the amount of any such price decrease. Thus, Plaintiff argues that, unless and until it is established that a lost profits theory of damages will produce a greater recovery for at least some of the class members, the conflict described by Defendant cannot defeat class certification.[6]

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[5] The Court has used the term "overcharge theory" to describe a theory of damages which seeks to recover the overcharge for 3M transparent tape allegedly paid by class members. As Dr. Rubinfeld points out in his expert report, there exists a separate overcharge theory of damages, which would compensate class members for the difference in price between 3M branded products and the private label products to which a class member would have switched in the but-for world. (Rubinfeld Report, ¶ 92.) Plaintiff has not sought to proceed on this overcharge theory.

[6] Plaintiff also argues that class representatives are not generally required to pursue claims which are not suitable for disposition in a class action. (See 11/5/03 N.T. at 26.) The Court agrees with Plaintiff's assertion that class action treatment of lost profits claims is generally inappropriate, and that members of the proposed class who wished to pursue lost profits claims would need to opt out of any class that was ultimately certified. However, the conflict in this case does not arise from Plaintiff's failure to assert lost profits claims on behalf of the class. Rather, the conflict arises from the fact that the strategies for maximizing recovery under an overcharge and a lost profits theory of damages under the facts of this case conflict with each other,

"[M]ost courts hold that [a] conflict [between class members] must be more than merely speculative or hypothetical" before a named representative can be deemed inadequate. 5 James Wm. Moore, et al., Moore's Federal Practice 23.25 [4][b] (3d ed. 2003); see also Blackie v. Barrack, 524 F.2d 891, 909 (9th Cir. 1975)("[C]ourts have generally declined to consider conflicts, particularly as they regard damages, sufficient to defeat class action status at the outset unless the conflict is apparent, imminent, and on an issue at the very heart of the suit."); Audrey v. Federal Kemper Ins. Co., 142 F.R.D. 105, 111-13 (E.D. Pa. 1992) (where plaintiffs had presented persuasive evidence that all class members had been injured by defendant's conduct, and defendant had failed to present any evidence of potential antagonism between class members, proposed class representatives held to be adequate); In re South Central States Bakery Prods. Antitrust Litig., 86 F.R.D. 407, 418 (M.D. La. 1980)("A naked allegation of antagonism cannot defeat class certification; there must be an actual showing of a real probability of a potential conflict which goes to the subject matter of the suit.").

As a preliminary matter, the Court finds Plaintiff's attempt to characterize the "lost profits" theory of damages as invariably inferior to an overcharge theory of damages, and therefore unworthy

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so that Plaintiff's decision to pursue an overcharge theory and maximize its own recovery runs a serious risk of minimizing the recovery of other potential class members.

of the Court's attention, to be unavailing. Dr. Rubinfeld presented an example of a situation in which a lost profits theory of damages would produce a substantially greater recovery for a plaintiff than an overcharge theory of damages. (See 10/3/03 N.T. at 56, 10/3/03 N.T. Ex. 15.) Dr. Rubinfeld further opined that there was a substantial likelihood that a lost profits theory of damages would be more favorable to at least some of the proposed class members than an overcharge theory of damages. (10/3/03 N.T. at 66.)

Furthermore, the Court finds Plaintiff's attempt to characterize the conflict in this action as speculative to be misplaced. It is true that Dr. Rubinfeld readily admitted that his testimony was based upon hypothetical numbers. Dr. Rubinfeld further conceded that, although he is "virtually certain that the [lost profit] theory would be beneficial to some and not to others," he does not yet know whether or not a lost profits theory would produce a greater recovery for any specific member of the proposed class. (8/3/03 N.T. at 66-67.) However, the fact that Dr. Rubinfeld does not yet have the empirical data to support his opinion that a lost profits analysis would be preferable to some class members does not, in itself, indicate that the conflict between members of the potential class is merely speculative.[7] It

[7] Other courts have found class representatives inadequate on the basis of the hypotheses of economic experts, even in the absence of empirical proof. For example, in Telecomm Technical Servs., Inc. v. Siemens Rolm Commun., Inc., 172 F.R.D. 532 (N.D.

is not Defendant's burden to definitively establish through the use of empirical data that a conflict among class members actually exists. Indeed, at this stage of the litigation, when no merits discovery has yet taken place, it would in many cases be impossible for a defendant to do so. Furthermore, Plaintiff has presented no empirical evidence contradicting Dr. Rubinfeld's testimony that a lost profits theory would likely be beneficial to at least some class members in this case. Indeed, the treatise that Plaintiff relies upon for its argument that an overcharge theory would be more beneficial to all proposed class members contains examples of situations in which the damages available under a lost profits theory exceed the damages available under an overcharge theory. II Phillip E. Areeda, et al., Antitrust Law, ¶ 394 (2d Ed. 2000). Furthermore, there was evidence presented at the LePage's trial which lends support to the argument that a lost profits theory may

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Ga. 1997), the court found that the adequacy of representation requirement was not satisfied in a case which challenged the defendant's practice of requiring consumers to purchase its service plans in order to obtain its proprietary replacement parts. The court based its holding on the fact that, if the relief that Plaintiff sought (an end to the tying arrangement) were granted, the predictable economic response of the defendant would be to raise prices on its replacement parts, which, under the unique factual circumstances of the case, would have benefitted some members of the proposed class while harming others. Id. at 545. The Telecomm court did not require empirical proof that the defendant would have raised prices if the tying arrangement had ended. The court reasoned that, "in the [ ] class framed by the plaintiffs, not all prospective members have the same interest, and the interests are conceivably antagonistic. Plaintiffs have raised no evidence or argument that the increased price of parts will not create antagonistic interests within the proposed class." Id.

produce a greater recovery for some class members in this case. Specifically, through the expert testimony of a Dr. Musika, LePage's introduced evidence tending to show that, because of 3M's unlawful bundled rebates and discounting programs, it had been forced to lower the price of its competing product below the price that it would have received in a but-for world. (See Def's Opp. Class Cert. Ex. D.) This theory, which Dr. Musika labeled a "price erosion theory," posits that, in a but-for world absent Defendant's illegal conduct, prices for LePage's and other private label tape would have risen. (See id.) At the class certification hearing, Plaintiff's expert witness, Dr. Morton Kamien, essentially conceded that, if Dr. Musika's price erosion theory were correct, the recovery of a direct purchaser of private label tape under an overcharge theory would be severely limited or entirely foreclosed. (8/13/03 N.T. at 171-75.)

In order to further explain the nature of the potential conflicts between class members, Dr. Rubinfeld described conflicting economic theories concerning the effect that the entry of a generic substitute will have on the price of a branded product. (See Rubinfeld Report, ¶¶ 67-68.) Some economists theorize that the price of a branded product will fall in response to the entry of a generic in the market, a phenomenon that would be helpful to Plaintiff's recovery under an overcharge theory of damages. (See id.) Other economists, however, theorize that the

price of a premium branded product actually *increases* in response to the entry of a generic product into the market. This is known as the market segmentation theory, and it is based on the concept that a consumer's attachment to a particular brand of product will cause that product to occupy a different niche, and a higher price, in the marketplace than is occupied by the generic product. (See id.) The market segmentation theory could be fatal to Plaintiff's overcharge theory, as Plaintiff would recover nothing if the price of 3M branded tape would have risen absent 3M's anticompetive conduct. Dr. Kamien argues that the market segmentation theory has been discredited, and that the phenomenon of rising branded product prices in the face of generic competition only exists in extremely narrow circumstances, which are not present here. (8/13/03 N.T. at 155-58.)[8] Dr. Rubinfeld strongly disagrees with Dr. Kamien's conclusion that this phenomenon is not applicable to the

[8] Specifically, Dr. Kamien argues that this theory is only relevant under certain situations in specific industries. (8/13/03 N.T. at 155-58.) For example, Dr. Kamien notes that there have been instances in the pharmaceutical industry where, just as a branded drug goes off patent, the maker of the branded drug will introduce its own generic into the marketplace and simultaneously raise the price of its branded product, thereby heavily incentivizing consumers to switch to the generic product. (See id.) This strategy allows the manufacturer of the branded drug to "lock up" the newly created generic market before other manufacturers can successfully introduce their own generic products. (See Pl's Reply Mem. at 8, n. 2; 8/13/03 N.T. at 155.) However, according to Dr. Kamien, this "lock up" theory only makes sense if the maker of the branded product is the first manufacturer to introduce a generic product. (8/13/03 N.T. at 157.) There appears to be no dispute that Defendant was not the first manufacturer to introduce private label tape.

transparent tape market. Plaintiff characterizes the testimony of Dr. Kamien and Dr. Rubinfeld with respect to these theories as the type of "dueling expert" testimony that is properly considered by a fact finder considering the merits of the dispute, and that is not properly considered on a motion for class certification. Although Plaintiff is correct that the Court cannot find as fact on a motion for class certification that either one of these theories is correct, the Court may, and does, find that Dr. Rubinfeld has presented a credible theory relevant to the calculation of damages in this case that would likely be beneficial to some members of the proposed class and at the same time would limit or foreclose any recovery on the part of Plaintiff. Furthermore, because some potential class members would likely have a strong incentive to pursue Dr. Rubinfeld's theory if this class were certified, while Plaintiff would have a strong incentive to pursue the theory espoused by Dr. Kamien and ignore Dr. Rubinfeld's theory, the conflict between class members exists regardless of which of the two theories is more appropriately applied to the market for transparent tape. The Court therefore finds that the conflict between large volume retailers and Plaintiff is neither speculative nor hypothetical, but is rather "apparent, imminent and on an issue at the heart of this litigation." Blackie, 524 F.2d at 909.

The cases that Plaintiff cites in support of its position that the conflict in this case is merely speculative or hypothetical are

inapposite. In In re Visa Check/Master Money Antitrust Litig., 280 F.3d 124 (2d Cir. 2001), the United States Court of Appeals for the Second Circuit ("Second Circuit") considered the certification of a proposed class of merchants who accepted Visa and Mastercard credit and debit cards as a form of payment. Plaintiff argued that Defendant had created an illegal tying arrangement by forcing retailers who accepted Visa and Mastercard credit cards to also accept Visa and Mastercard debit cards for payment. The class included retailers who primarily conducted credit card transactions, as well as retailers who primarily conducted debit card transactions. Defendant argued that the potential for conflict between class members was high, as those class members who mainly conducted credit card transactions would have the incentive to argue that the cost of credit card transactions would not have risen in the absence of the tie, in order to maximize their recovery. By contrast, retailers who mainly conducted debit card transactions would have far less interest in pursuing such a strategy, and would instead wish to concentrate their efforts in demonstrating that the price of debit card transactions would have fallen in the absence of the tie. The Second Circuit, with one judge dissenting, rejected this argument, reasoning that, while the price of credit card transactions absent the tie would be less relevant to the recovery of retailers who predominantly conducted debit card transactions, *all* potential class members would benefit

from a showing that the prices for credit card transactions would have stayed the same, or risen negligibly, in the absence of the tie. Id. at 144-45.

By contrast, as explained, *supra,* many of the largest class members in this case may not benefit from Plaintiff's strategy of pursing an overcharge theory of damages, but rather may be *harmed* by Plaintiff's attempts to pursue this theory. Accordingly, Plaintiff's incentive to maximize its own recovery may work to the detriment of other members of the proposed class.

Plaintiff further argues that the conflict between itself and the large retailer class members who sell private label transparent tape is illusory, because it could have taken advantage of any shift to private label tape in the but-for world by purchasing private label tape itself. Indeed, if Plaintiff were able to establish that it could easily have shifted its product mix to account for the rise in market share of private label tape in the but-for world, it might have a credible argument that its interest in exploring a lost profits theory of damages during the merits stage of this litigation would be little different than the interest of any other member of the proposed class.

However, Plaintiff's assertion that it could have easily pursued private label tape is not supported by the factual record in this case. Arthur Larson, who was in charge of purchasing for Plaintiff from 1989 through 2002, testified that Plaintiff only

purchased 3M branded tape, had never purchased private label tape from any supplier, and had never possessed any interest in doing so. (Larson Dep. at 41, 46-47.) The reason for this, according to Mr. Larson, was that "[plaintiff] didn't really do a volume that would justify private labeling an item." (Id. at 46.) Mr. Larson further testified that, with one exception (paintbrushes), Plaintiff had never tried to introduce a private label office product of any variety. (Id. at 45.) Dr. Rubinfeld also explained that a retailer must be of a sufficiently large size to justify the development and marketing of its own private label, and that therefore private label products are not generally offered by small retailers. (Rubinfeld Report, ¶ 66.) Accordingly, any argument that Plaintiff's failure to purchase private-label transparent tape was the result of Defendant's unlawful conduct, and that Plaintiff would have purchased private label transparent tape in the but-for world, is belied by the testimony of Mr. Larson and Dr. Rubinfeld. Dr. Kamien did argue in his testimony that there was no reason why Plaintiff would not have been able to introduce private label tape into the market itself. (See 11/04/03 N.T. at 136-37.) However, Dr. Kamien's testimony does not provide an adequate response to the testimony of Dr. Rubinfeld and Mr. Larson. Indeed, Dr. Kamien never clearly explained how a retailer in Bradburn's position could have cultivated private label tape, and he appeared to merely assume that any retailer who wished could enter the private label

market. Dr. Kamien testified as follows:

> So, I don't see these kinds of distinctions between, you know, where did they get the private label, did they try to get the private label, are they builders of private label. They're profit maximizers and they don't want to be eliminated from the market and just sit by and say, well, you know, it's happening, that's it.

(11/4/03 N.T. at 137.) Thus, Plaintiff has not made any showing that it either purchased private label tape, or that it would have had any opportunity to purchase such private label tape absent Defendant's conduct.[9] As a result, Plaintiff maintains a vastly

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[9] There existed confusion at many points during the class certification hearing concerning the proper definition of "private label" tape. Specifically, Dr. Kamien suggested during his testimony that, assuming that the company chose to produce it, Plaintiff could have purchased private label tape branded with the Crayola name. (N.T. 11/4/03 at 163.) (Dr. Kamien was speaking hypothetically, and there is no dispute that Crayola does not manufacture transparent tape.) As noted, *supra*, in the instant memorandum the Court adheres to the definition of private label used in the Third Circuit's *en banc* opinion in LePage's II, which defines private label tape as "tape sold under the retailer's name rather than under the name of the manufacturer." LePage's II, 324 F.3d at 144. The court in Lepage's II referred to tape, other than Scotch brand tape, sold under the manufacturer's label as "second brand" tape. Id. Under the Third Circuit's definitions, tape bearing the Crayola label would not be considered private label tape, but rather "second brand" tape. Thus, Plaintiff's assertion that it could have purchased Crayola branded tape provides no support for Plaintiff's assertion that it could have entered the private label market.

Furthermore, even assuming, *arguendo,* that Plaintiff would have been in a position to purchase "second brand" tape, there is no evidence in the record which indicates that the markets for private label and "second brand" tape would have behaved identically or even similarly in the marketplace absent Defendant's anti-competitive conduct. Indeed, Dr. Rubinfeld states in his expert report that "different factors affect that price and

different position in the market for transparent tape than do the large volume retailers, a position which creates a serious and imminent potential conflict between it and other members of the proposed class.

Finally, because the Court finds that the conflict of interest between Plaintiff and the large-volume retailers would exist from the moment that the class was certified, the Court rejects Plaintiff's assertion that the opt out procedure found in Federal Rule of Civil Procedure 23(c)(2) would either cure or render moot the problems inherent in Plaintiff's representation of the proposed class. The United States Supreme Court ("Supreme Court") has held that:

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quantity sold of non-3M branded products (such as LePage's own brand or Manco's Duck brand) than affect the price and quantity sold of private label products." (Rubinfeld Report, ¶ 94.) Moreover, evidence presented at the LePage's trial tends to indicate that private label tape, and not "second brand" tape, would have been in a position to gain market share in the absence of Defendant's anti-competitive conduct. Dr. Musika, LePage's expert on damages at trial, constructed a lost market share model of damages which projected that there would have been a 1% shift each year from 1992 until 2000 from branded tape sales to private label tape sales. LePage's II, 324 F.3d at 165. Furthermore, Defendant's own internal documents make clear that Defendant perceived the competitive threat to its transparent tape sales to come from private label tape, and not "second brand" tape manufactured by other suppliers. Defendant's 1995 Global Strategic Plan indicated that, at the time, "There are no established or recognized competitive brands in the marketplace; the competition is private label and/or low cost offshore products." (Pl's Class Ex. F, at 18.) Accordingly, the Court finds that the imminent potential conflicts between Plaintiff and those retailers who were able to trade in private label tape exist regardless of whether Plaintiff would have had the ability to sell "second brand" tape.

> due process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning an "opt out" or "request for exclusion" form to the court. Finally, the Due Process Clause of course requires that the named plaintiff *at all times* adequately represent the interests of the absent class members.

Phillips Petroleum v. Shutts, 472 U.S. 797, 812 (1985)(citing Hansberry v. Lee, 311 U.S. 32, 42-43 (1940))(emphasis added). Furthermore, placing the onus on members of the proposed class to affirmatively opt out seems particularly unfair in this case given the fact that there is no evidence in the record that any of the largest class members, who alone account for the vast majority of Defendant's transparent tape sales (see *supra*, n. 4), have demonstrated the slightest interest in pursuing this matter. Cf. In re Microsoft Corp. Antitrust Litig., 214 F.R.D. 371, 376-77 (D. Md. 2003)(refusing to certify a class containing large purchasers for failure to satisfy Rule 23(b)(1) and (b)(3), in part because those large customers had the incentive, as well as the resources, to institute their own individual actions if they wished.)[10]

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[10] The Court further notes that at least some members of the proposed class have publicly stated their opposition to the Third Circuit's finding in LePage's that the conduct engaged in by Defendant was illegal in the first place. Specifically, Staples has joined an amicus brief filed before the Supreme Court which urges the Court to grant *certiorari* and reverse the Third Circuit's holding in LePage's II. (See Def's Mot. for Judicial Notice, Ex. A.) Similarly, the business roundtable, a group comprised of approximately 150 Chief Executive Officers of U.S. companies, including the nation's third largest retailer, has filed an amicus brief urging the Supreme Court to grant *certiorari* and reverse the Third Circuit's ruling. (See Def's Mot for Judicial Notice, Ex.

Thus, because Plaintiff's theory of damages is antagonistic to an alternative theory that many class members will likely wish to pursue, and because Plaintiff is not in a position to pursue this alternative theory itself, Plaintiff's interests are antagonistic to those of other members of the proposed class. The Court therefore finds that Plaintiff cannot adequately represent the interests of all of the proposed class members.[11]

C. Typicality

In order for Plaintiff to satisfy this requirement, Plaintiff must show that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Fed.

B.) Some disagreement among class members will not generally be sufficient to render the class representative inadequate. 5 James Wm. Moore, et al., Moore's Federal Practice, § 23.25[4][b] (3d ed. 2003). However, "courts have found class representatives to be inadequate if a substantial number of the class members are clearly and vigorously opposed to the litigation." Id. (citing East Texas Motor Freight Sys. v. Rodriguez, 431 U.S. 395, 403 (1977)). While two objections arising out of hundreds of potential class members certainly does not qualify as a substantial number, the Court is mindful of the fact that, as discussed *supra*, the eight largest purchasers of 3M's transparent tape comprise the vast majority of its sales.

[11] Defendant alternatively argues that Plaintiff is not an adequate class representative because of alleged prior breaches of fiduciary duty by Plaintiff's corporate officers. (See Def's Opp. Class Cert., Mem. at 29-37.) Defendant also argues that the marital relationship between Brad Parkinson, the owner of 90% of the stock of Plaintiff, and Terry Parkinson, who is one of the class counsel in this action, creates a conflict of interest which disqualifies Plaintiff from serving as class representative. (See id.) The Court need not address these arguments, as the Court finds, for the reasons stated *supra*, that Plaintiff is an inadequate class representative.

R. Civ. P. 23(a). "The typicality requirement is intended to preclude certification of those cases where the legal theories of the named plaintiffs potentially conflict with those of the absentees." Georgine, 83 F.3d at 631 (citation omitted). Accordingly, "The inquiry assesses whether the named plaintiffs have incentives that align with those of absent class members so that the absentees' interests will be fairly represented." Id. (citation omitted). The typicality requirement is therefore quite similar to the adequacy of representation requirement, in that "both look to the potential for conflicts in the class." Id. On the other hand, the mere existence of factual differences between the claims of class members does not preclude a finding of typicality. Rather, "'[f]actual differences will not render a claim atypical if the claim arises from the same event or practice or course of conduct that gives rise to the claims of the class members, and if it is based on the same legal theory.'" Barnes, 161 F.3d at 141 (quoting 1 Newberg on Class Actions, § 3.15, at 3-78); see also Baby Neal, 43 F.3d at 58("[E]ven relatively pronounced factual differences will generally not preclude a finding of typicality where there is a strong similarity of legal theories.")

For the reasons discussed *supra*, in connection with Plaintiff's ability to adequately represent the interests of the class, it is clear to the Court that Plaintiff's claims are not typical of the claims of many members of the proposed class. In

particular, Plaintiff's inability to sell private label tape, and consequent lack of incentive to pursue legal theories which may benefit those class members who had the ability to cultivate private label tape sales, requires a finding that Plaintiff's claims are not typical of those of the class.

D. Rule 23(b) Requirements

The parties dispute whether Plaintiff satisfies the requirements of Rule 23(b), and specifically whether common questions predominate over individual questions pursuant to Rule 23(b)(3). Because the Court finds that Plaintiff is not an adequate class representative pursuant to Rule 23(a), the Court does not reach this issue.

IV. CONCLUSION

For the foregoing reasons, Plaintiff's Motion for Class Certification is denied.

An appropriate order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRADBURN PARENT/TEACHER STORE, INC.	:	CIVIL ACTION
v.	:	
3M (MINNESOTA MINING AND MANUFACTURING COMPANY)	:	NO. 02-7676

ORDER

AND NOW, this 1st day of March, 2004, **IT IS HEREBY ORDERED** that, upon consideration of Plaintiff's Motion for Class Certification (Docket # 53), all related submissions, and the testimony taken at the hearing held in open court, for the reasons stated in the accompanying memorandum, Plaintiff's Motion is **DENIED**.

BY THE COURT:

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John R. Padova, J.